IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, Petitioner,

vs.

WILLIAM R. McCOMB,
Administrator of the Wage and Hour Division,
United States Department of Labor

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Sixth Circuit

BRIEF ON BEHALF OF PETITIONER

GEORGE S. DIXON,
Matheson, Dixon & Brady,
Counsel for Petitioner.

Interstate Brief & Record Co., Penobscot Bldg., 457 Fort St. W., Detroit 26, Mich.

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BRIEF ON BEHALF OF PETITIONER

REFERENCE TO OFFICIAL REPORTS

The United States District Court, Eastern District of Michigan, conclusions of law (R. 39) upon which an order was entered dismissing the bill of complaint of the Admin-

istrator of the Wage and Hour Division, United States Department of Labor, are not officially reported.

The United States Circuit Court of Appeals, Sixth Circuit, opinion (R. 48-54), reversing the District Court judgment and remanding the case for further proceedings consistent with the views expressed therein, is reported in *155 F. (2nd) 832.*

STATEMENT OF JURISDICTION

This Court's allowance of review by Certiorari limits review to the question of the availability to Petitioner, with respect to certain of his employees, of the exemption set forth in Section 13 (b)(1)[1] of the Fair Labor Standards Act, on the basis of their being employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204[2] of the Motor Carrier Act, 1935. (Interstate Commerce Act, Part II).

The availability to Petitioner of the Section 13(b)(1) defense was passed upon affirmatively by the District Court for the Eastern District of Michigan (R. 39), but the defense was held unavailable to Petitioner by the United States Circuit Court of Appeals for the Sixth Circuit (R. 48-54) on the ground that employees do not come within the exemption provision unless they devote a *substantial part of their time* to the performance of duties affecting safety of operation and on the further ground

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[1] Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 213. Appendix, p. 61.

[2] Act of 1935, c. 498, 49 Stat. 543, 49 U. S. C. A., Sec. 304. Appendix, p. 65.

that Petitioner had not met the burden of proving that any of his employees did spend a *substantial part of their time* in the performance of duties affecting safety of operation.

The opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit was of necessity predicated upon a judicial interpretation of the provisions of Section 13(b)(1) of the Fair Labor Standards Act and of the provisions of Section 204 of the Motor Carrier Act, 1935.

Interpretation of those specific sections of the two federal statutes, referred to above, by the Circuit Court of Appeals for the Second Circuit[3] and by the Illinois Supreme Court[4] were reviewed by this Court on Writs of Certiorari at the last term. The cases so reviewed had their inception in suits instituted by employees for recovery of unpaid overtime compensation.[5]

This case had its inception in an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor, upon complaint seeking an injunction[6] to restrain Petitioner from violations of Section 15(a)(1)[7] and Section 15(a)(2)[8] of said Act. The Administrator, on page 6 of his memorandum filed in this cause, invites review by Certiorari of the Circuit Court of Appeals, Sixth Circuit, interpretation of said Federal Stat-

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[3] *Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.*

[4] *Levinson v. Spector Motor Service, 91 L. Ed. 846.*

[5] Under Section 16(b) of the Fair Labor Standards Act.

[6] Under Section 17 of the Fair Labor Standards Act.

[7] See Appendix, p. 62.

[8] See Appendix, p. 62.

utes on the ground that the question is of importance in his administration of the Fair Labor Standards Act.

Such review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit is within the jurisdiction of this Court. *(U. S. Code, Title 28, Sec. 347.)*

STATEMENT OF THE CASE

Review by Certiorari is limited by this Court's Order to the second question presented in the Petition for Writ of Certiorari. The second question so presented is whether or not certain of Petitioner's employees, who transport property moving in interstate commerce during a minority of their employment, fall within the exemption provisions of Section 13(b)(1)[9] of the Fair Labor Standards Act and are therefore exempt from the overtime provisions of Sec tion 7[10] of said Act. This requires a further determination as to whether or not such employees perform sufficient duties affecting safety of operation as to bring them within the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service under the provisions of Section 204(a)[11] of the Motor Carrier Act, 1935.

The facts of record were presented to the lower Court in the form of an agreed Stipulation (R. 11-27) and supplement thereto (R. 28-38), here summarized to the extent deemed material to this Court's determination of the specific question to which review by Certiorari is limited.

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[9] See Appendix, p. 61.

[10] See Appendix, p. 61.

[11] See Appendix, p. 65.

Petitioner, an individual, doing business as J. F. Morris Cartage Co., is engaged in a cartage business in the metropolitan area of Detroit, Michigan. He operates approximately fifty trucks, or tractor units, and approximately sixty trailers in such service. He employs approximately sixty persons, of whom some forty are employed as truck drivers and some fourteen others are employed as garage workers, including mechanics. The transportation services are performed wholly within the State of Michigan, being confined within the territorial limits of three counties in Michigan embracing and surrounding the Detroit Metropolitan area (R. 11).

Petitioner operates as a motor common carrier for hire (R. 11), is engaged in a general cartage business and is prepared to render such service to the general shipping public (R. 12). However, on the basis of a detailed examination and analysis of Petitioner's operations during the calendar year 1941 (the calendar year preceding the date of filing of Bill of Complaint) it was determined that approximately 97% of the total revenue derived by Petitioner from such cartage services was received for cartage services performed for two steel corporations located in Ecorse, Michigan (R. 12).

Petitioner's cartage services fall principally into five categories:

A. Approximately 60% consists of transportation of steel from Ecorse steel mills to Detroit manufacturing plants (R. 12), the greater part of which steel is used in the production of goods for subsequent sale and shipment, a substantial portion of which latter goods are shipped in interstate commerce (R. 14).

B. Approximately 35% consists of transportation of steel within or between the Ecorse steel mills for the pur-

pose of further processing in the course of manufacture prior to sale and shipment. An unsegregated portion of such steel is ultimately shipped, directly or indirectly, in interstate commerce (R. 12).

C. Approximately 3% consists of transportation of freight between said Ecorse steel plants and interchange points in the Detroit Metropolitan area such as boat docks, railroad depots, freight terminals and truck terminals. This transportation involves the pickup and delivery of freight moving in continuous transportation in interstate commerce through connection between Petitioner and other interstate carriers. Petitioner's compensation for his portion of the through transportation service is in some instances paid to him by the shipper and in other instances is paid to him by the connecting carrier as a division of the through rate on the transportation movement (R. 13).

D. Approximately 1% consists of transportation of freight from Detroit industrial establishments to said Ecorse steel mills (R. 13).

E. Approximately 1% consists of transportation of miscellaneous freight, in general cartage service, for hire, and for shippers other than said Ecorse steel mills. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D except that it is performed for shippers other than said Ecorse steel mills (R. 13).

While the above analysis is confined to approximations, a more detailed and precise analysis of the transportation operations actually performed by Petitioner's drivers during the calendar year 1941 is disclosed in Exhibits C-1 (R. 24, 25) and C-2 (R. 26, 27). The latter two exhibits reflect an analysis of 19,786 trips of all types performed during 1941 (R. 15), which are segregated categorically as follows:

	Number	Percentage
Total trips[1]	19,786	100%
Pickup trips[2]	464	2.34%
Boat Dock Trips[3]	260	1.31%
Intrastate Trips[4]	19,062	96.35%

(R. 15)

Exhibit C-1 (R. 24, 25) is an analysis, by work weeks, of the type of transportation performed by all of Petitioner's drivers who were employed for eight or more workweeks during 1941. Exhibit C-2 (R. 26, 27) is an analysis, by employees, of the same trips.

Exhibit C-1 discloses that in the average workweek, 1941, 75.6% of Petitioner's drivers were exclusively engaged in interplant trips and 24.4% made one or more pickup or delivery trips or both (R. 16). It also discloses that the number of drivers performing pickup, or boat dock trips, or both, varied from week to week, ranging from a minimum of one driver in the week ending April 12, as against 41 drivers performing interplant movement exclusively, to a maximum of 25 drivers in the week ending September 27, as against 7 drivers performing interplant movements exclusively (R. 24, 25).

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[1] Performed by all truck drivers who were employed 8 or more workweeks during 1941.

[2] Trips of the type described in subparagraphs C or E above which involved movement of goods to or from railroad freight houses or line haul carrier depots.

[3] Trips of the type described in subparagraphs C or E above which involved movements of goods to or from boat docks in Detroit (occurring during open navigation only).

[4] Trips of the type described in subparagraphs A, B and D above and here identified as intrastate trips to differentiate them from the pickup and boat dock trips.

Exhibit C-2 discloses that the average truck driver was exclusively engaged in interplant transportation during 75.6% of the workweeks in 1941. Two truck drivers were exclusively engaged in interplant transportation during their entire 1941 employment. All but two other truck drivers were exclusively engaged in interplant transportation during 50% or more of the 1941 workweeks (R. 16).

Exhibit C-2 also discloses that in the range between the two drivers who performed no pickup or delivery or boat dock trips during their entire 1941 employment and the two other drivers who performed some such transportation in more than one-half of the weeks in their 1941 employment, there was considerable variation in percentages among the remaining drivers who performed interplant transportation exclusively during a majority of their weeks of employment.

Those employees of Petitioner employed as truck drivers, mechanics and as Superintendent of Maintenance have been employed by Petitioner for hours in excess of those prescribed by Section 7[1] of the Fair Labor Standards Act and have received only straight time compensation for such excessive hours, except as hereinafter indicated, contrary to the requirements of Section 7 of said Act (R. 16, 17, 18).

Petitioner's truck drivers are employed under the provisions of a Union Contract (Exhibited in its entirety, R. 29-35, and identified as Exhibit D-1). Such contract establishes a 52 hour workweek and provides for payment of overtime compensation at time and one-half the regular hourly rate for all hours worked in excess of 52 in any

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[1] See Appendix, p. 61.

workweek (R. 31). Subsequently the workweek was established at 54 hours by voluntary agreement between Petitioner and the Union at the request of the Office of Production Management (R. 35, 36, 37, 38). Petitioner's truck drivers have received overtime compensation in conformity with the union agreement, as amended, rather than in conformity with the Fair Labor Standards Act (R. 18). The union contract above referred to covered all union drivers engaged in cartage operations in the Detroit Metropolitan area, whether employed by interstate carriers or by intrastate carriers (R. 19).

ASSIGNMENT OF ERRORS

Petitioner alleges that the United States Circuit Court of Appeals for the Sixth Circuit committed error in its entry of judgment on May 29, 1946, and in its opinion in support of such judgment, in the following particulars:

1. In concluding, as a matter of law, that an employee of a motor carrier for hire must devote a substantial part of his time to the performance of duties affecting the safety of operation of motor vehicles transporting property in interstate commerce before such employee falls within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

2. In finding, as a matter of fact, that no employee of Petitioner did spend a sufficient part of his time in the performance of duties affecting the safety of operation of motor vehicles transporting property in interstate commerce so as to bring such employee within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

SUMMARY OF ARGUMENT

I. CERTAIN OF PETITIONER'S EMPLOYEES TRANSPORT INTERSTATE FREIGHT.

Petitioner is engaged individually in the transportation of freight as a motor common carrier for hire. He conducts a general cartage service in the Detroit Metropolitan area. The majority of the freight so transported is moving in intrastate commerce (R. 11, 12).

An analysis of 19,786 transportation operations conducted by Petitioner's employees in 1941 revealed that between 3% and 4% of these operations consisted of the picking up or delivery of freight, in the Detroit Metropolitan area, while moving in continuous transportation in interstate commerce. This service is performed either for the shipper or for the connecting carrier (R. 13).

The frequency with which interstate freight pickup and delivery trips were performed in the Detroit Metropolitan area varied from week to week and from employee to employee. Exhibit C-1 and C-2 (R. 24-27).

Transportation operations may be in interstate commerce with crossing state lines. *Motor Carrier Act, 1935, secs. 202(c),*[1] *203(b)(8),*[2] *206(a);*[3] *Ex Parte No. MC 3, 23 M. C. C. 1; Administrative Ruling No. 79.*

Petitioner's employees engagement in interstate commerce was recognized in the lower Court decisions, applicability of the Section 13(b)(1) exemption being denied by the Sixth Circuit on the grounds of lack of substan-

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[1] See Appendix, p. 63.

[2] See Appendix, p. 63.

[3] See Appendix, p. 66.

tiality, rather than on the grounds of complete absence of interstate transportation (R. 48-54).

As a common carrier for hire, Petitioner is required to transport, and may require his employees to handle, interstate freight dependent purely upon the shipping requirements or exigencies of the general shipping public.

Petitioner also employs garage mechanics whose activities may place them within the Section 13(b)(1) exemption.

II. SUCH INTERSTATE TRANSPORTATION IS SUBJECT TO REGULATION UNDER THE MOTOR CARRIER ACT.

Section 202(a),[1] 202(c) and 203(b)(8) of the Motor Carrier Act, when read together, indicate that transportation operations of the type performed by Petitioner in interstate commerce are subjected to federal regulations at least to the extent of compliance with the safety regulations of the Interstate Commerce Commission.

Section 203(b)(9)[2] of the Motor Carrier Act indicates that Congress intended to extend Commission regulation even to casual and occasional motor carrier transportation in interstate commerce by persons not engaged in transportation by motor vehicle as a regular occupation or business. The words "casual" and "occasional" were used by Congress in their generally accepted meaning. *Martin v. United States,* 100 F. (2nd) 490. This indicates that Congress intended to subject motor carrier transportation in interstate commerce to federal regulation irrespective of the volume of interstate traffic carried or the frequency with which such transportation is performed.

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[1] See Appendix, p. 63.

[2] See Appendix, p. 65.

If Congress intended to extend federal regulation to casual and occasional interstate motor carrier operations by persons not regularly engaged in transportation, *a fortiori*, Congress intended to extend federal regulation to motor carriers regularly engaged in transportation irrespective of how casual or occasional were the interstate movements performed.

III. SUCH EMPLOYEES ARE SUBJECT TO THE SAFETY REGULATORY POWER OF THE INTERSTATE COMMERCE COMMISSION.

Section 204(a)[1] of the Motor Carrier Act imposes a duty on, and grants power to, the Interstate Commerce Commission to establish qualifications and maximum hours of service of employees and safety of operation of equipment. This power extends only to those motor carrier employees whose duties affect safety of operation. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534.

Judicial interpretation of Section 204(a) of the Motor Carrier Act is a prerequisite to judicial interpretation of the Section 13(b)(1) exemption. Such interpretation is a judicial function. *United States v. American Trucking Associations, Inc.*, cited *supra*, 544.

However, the safety reports and regulations of the Interstate Commerce Commission, issued before and subsequent to the enactment of the Fair Labor Standards Act, "deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to a specially significant weight in the interpretation of this Act (Motor Carrier Act, 1935) the enforcement of which has been committed by Congress solely to that

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[1] See Appendix, p. 65.

Commission." *Levinson v. Spector Motor Service*, 91 L. Ed. 846, 853.

In its earliest reported motor carrier safety order the Interstate Commerce Commission established initial safety rules and regulations and acknowledged that "first and foremost in the problem of motor vehicle safety is the driver, the man at the wheel." *Ex Parte No. MC 4, 1 MCC 1, 7.* We are here principally concerned with the applicability of the Section 13(b)(1) exemption to drivers because two-thirds of Petitioner's employees are in that classification and review by certiorari is limited to the application of Section 13(b)(1) exemption.

Unlike the situation in *Levinson v. Spector Motor Service*, cited *supra*, where the question involved applicability of the Section 13(b)(1) exemption to a partial-duty loader in advance of Commission adoption of specific qualifications, standards and maximum hours of service, we are here concerned with the applicability of the exemption to full time drivers, whose duties are partial only in the sense that interstate freight is handled a minority of the time. The Commission has established qualifications, standards and maximum hours of service for drivers and "the issue is more obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier." *Levinson v. Spector Motor Service*, cited *supra*, 861.

The Interstate Commerce Commission extends safety regulation to drivers who may spend a majority of their time performing non-driving duties, as for example, drivers engaged in picking up and delivering interstate freight in cities and towns. *Ex Parte No. MC 2, 3 MCC* 665, 671.

The Interstate Commerce Commission has extended its maximum hours of service regulation to drivers of for

hire motor carriers and private motor carriers otherwise exempt by order of the Commission from safety regulations and otherwise exempt from the provisions of the Motor Carrier Act under Section 203(b).

Ex Parte No. MC 4, 10 MCC 533; 14 MCC 669; Ex Parte No. MC 3, 26 MCC 205.

The Interstate Commerce Commission takes the position that application of the overtime compensation provisions of the Fair Labor Standards Act to the hours of service of a motor vehicle driver will have no appreciable effect upon safety of operation because no statutory maximum hours of service limitation is imposed by the Fair Labor Standards Act. Accordingly, in the interest of safety, the Commission takes the further position that its safety regulatory powers, as expressed in its maximum hours of service regulations, extend on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week and extend on an hourly basis to any driver who operates a motor vehicle in the transportation of interstate freight during any one period of 24 consecutive hours. *Ex Parte No. MC 3, 23 MCC 1, 39.*

Lower Court determinations that the Section 13(b)(1) exemption is inapplicable to motor carrier employees unless they devote a substantial part of their time to the performance of duties affecting safety of operation are based upon a misinterpretation of the Commission's findings in *Ex Parte No. MC 2, 28 MCC 125.* Those findings related to *classes* of employees and made no attempt to condition application of the exemption upon the amount of time spent in the performance of safety activities by *individual* employees.

Petitioner's latter interpretation of the Commission's decision in *Ex Parte No. MC 2, 28 MCC 125,* is adopted by this Court's majority in *Levinson v. Spector Motor Service, cited supra, 856.* The fundamental test, adopted by this Court in *United States v. American Trucking Association, Inc., cited supra,* and reaffirmed in the *Levinson* case, is simply that the employee's activities affect safety of operation.

This Court's minority in the *Levinson* case appears to accept the lower court's interpretation of the Commission's decision last above cited, but rejects the Commission's voluntary restriction on its safety regulatory powers on the ground "that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation" (868). In any event, the Commission decision involving these conflicting interpretations did not apply to drivers, the Commission having already concluded that its safety regulatory powers extended to both full-duty and partial-duty drivers.

In extending its maximum hours of service regulation on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week, *Ex Parte No. MC 3, 23 MCC 1, 39,* the Commission uses the designation "week" in the sense of any period of 168 consecutive hours, *Safety Regulations, 47 C. F. R. Cum. Supp., Parts 190* and *191,* rather than in the sense of any given "workweek," the unit for determination adopted by the Administrator of the Wage and Hour Division, *Interpretive Bulletin No. 9, Wage and Hour Manual (1944-1946 ed.) 520, 523.*

The Commission explains that under its Safety Regulations it has adopted a "sliding week" under which it becomes necessary to examine the duties performed by a

driver during the preceding 168 consecutive hours in order to determine his eligibility to drive in interstate commerce at any given time. *Hours of Service Regulations—Application and Interpretation, Administrative Ruling No. 79, C. C. H. Federal Carriers Service, Par. 6079.* Thus a driver engaged in driving in interstate commerce on one day of the Administrator's "workweek" may also be so engaged on one day in two consecutive Commission "sliding weeks."

IV. THE SAFETY REGULATORY POWER OF THE COMMISSION IS NOT AFFECTED BY THE VOLUME, DEGREE, OR FREQUENCY OF SUCH INTERSTATE TRANSPORTATION.

The Section 13(b)(1) exemption is applicable to partial-duty loaders who spend only a portion of their time loading. The applicability of the exemption to drivers is even more obvious "because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loads the freight which the driver is transporting." *Levinson v. Spector Motor Service, cited supra, 860.* Here we are concerned principally with the applicability of the exemption to full time drivers whose full time duties affect safety of operation, interstate or intrastate.

Both this Court's majority and minority in the *Levinson* case are in agreement that the safety program entrusted to the Interstate Commerce Commission by Congress and developed by the Commission should be preserved intact (852). This Court's majority said in the *Levinson* case: It is the character of the activities, rather than the proportion of time spent in those activities that determines the actual need for the Commission's exercise

of its safety regulatory powers (859). Even a partial-duty driver may create a greater safety hazard when he drives than a full time driver (862).

This Court's minority said in the *Levinson* case: Not the amount of time spent in the performance of duties affecting safety, but what is done during the time so spent, determines the effect on safety (865). Ten minutes of driving by an unqualified driver may do more harm on the highway than constant driving by a qualified driver (865). In relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, though the time thus spent is not five minutes daily or weekly (865). It cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effect upon safety (866).

This Court's minority in an early case suggested the possibility of extending the Section 13(b)(1) exemption even to non-carrier employees to thwart partial nullification of the Commission's safety regulatory powers. "We should refuse to whittle down that jurisdiction even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act." *Boutell, et al. v. Walling, 66 S. Ct. 631, 637.*

The Wage and Hour Administrator's interpretation of Section 13(b)(1) as being inapplicable to any motor carrier employee who spends the greater part of a work-week in the performance of non-exempt activities has been rejected in lower court decisions even where applicability of the exemption was denied on the ground of lack of substantiality. *Walling v. Comet Carriers, 151 F. (2d) 107;* certiorari granted, *326 U. S. 716;* Writ dismissed on motion of Petitioner's counsel, *328 U. S. 819.*

The Administrator's interpretation was disregarded by this Court and by the Fourth Circuit Court of Appeals in determining the Section 13(b)(1) exemption to be applicable to a motor carrier employee where the record facts showed a dispute as to whether the employee spent the greater or lesser portion of his time in exempt activities, both courts failing to discuss the Administrator's interpretation in reaching their determination. *Richardson v. James Gibbons Co., 132 F. (2d) 627;* affirmed, *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44.*

The Administrator's interpretation of Section 13(b) (1) is expressly rejected by this Court in the *Levinson* case, cited *supra,* 860; on the ground that the exemption should be interpreted in the light of the Interstate Commerce Commission's interpretation of its safety regulatory powers under Section 204 of the Motor Carrier Act, and the Commission inferentially had rejected the 50% test in its decision in *Ex Parte No. MC 3, 23 MCC 1.* Further, Congress in 1945 failed to act upon an amendment to Section 13(b)(1), proposed by the Administrator, which would have converted the Administrator's interpretation into statutory language.

Rejection of the Administrator's interpretation is even more imperative in considering the applicability of the Section 13(b)(1) exemption to Petitioner's employees in the instant case because we are principally concerned with drivers operating motor vehicles full time in an area of great population density and traffic concentration. Such employees are of a type whose non-qualification under Commission safety regulations is most likely to have an adverse effect upon safety of motor vehicle operation in interstate commerce. This is particularly true where, as employees of a motor common carrier, their handling of interstate freight is principally contingent upon the ship-

ping requirements of the employers' customers, rather than upon the conscious allocation of interstate freight by the carrier employer.

V. SUCH EMPLOYEES ARE EXEMPT FROM THE OVERTIME COMPENSATION PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

In view of the *Levinson* decision, cited *supra*, it appears probable that this Court's entire membership consistently could determine that at least certain of Petitioner's employees are subject to the Commission's safety regulatory powers during at least certain periods of their employment, the Commission having concluded that its maximum hours of service regulations extend on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week. *Ex Parte No. MC 3, 23 MCC 1, 39.*

In the event of such determination, it would seem to follow necessarily that such employees are, by the language of Section 13(b)(1) of the Fair Labor Standards Act, *automatically* excluded from the overtime compensation provisions of Section 7 of said Act. *Levinson v. Spector Motor Service, cited supra, 848, 862.* This Court's minority in the *Levinson* case concedes that a *literal* application of the exemption would result in automatic exclusion from the overtime compensation provisions (865, 866).

The only apparent alternative to exclusion of such employees from the overtime compensation provisions of the Fair Labor Standards Act would be adoption of the proposition suggested by this Court's minority in the *Levinson* case that possibly Congress intended to subject some motor carrier employees to concurrent jurisdiction of the Interstate Commerce Commission and the Adminis-

trator of the Wage and Hour Division, thus preserving the Commission's safety regulatory powers, while extending broad coverage of the Fair Labor Standards Act.

The difficulty with acceptance of this alternative "concurrent jurisdiction" theory in the instant case is that it would require reversal of this Court's previous decisions and would require disregard of the Congressional purpose as elsewhere expressed. It would require reversal of the *Levinson* decision because this Court's majority said, page 852, that "Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." It would also require reversal of *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44, 48-49,* where this Court said, without dissent, "The Amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

In the *Southland Gasoline Company* case this Court made reference to statements on the Senate floor to the effect that the amendment was intended to give motor vehicle operators the same exemption from the Fair Labor Standards Act as that enjoyed by railway employers. *81 Cong. Rec. 7875; 34 Stat. 1415; 39 Stat. 721,* and made reference to the motor carrier industry as "a business requiring fluctuating hours of employment, without the burden of additional pay for overtime" (48).

No reason is apparent why the stated benefits of the exemption should not be extended equally to a motor carrier a majority of whose traffic moves in intrastate commerce; nor why a motor carrier whose freight is predominantly interstate should be regulated by a single federal agency, while a motor carrier whose freight is

predominantly intrastate should be regulated concurrently by two federal agencies.

The Congressional intent to avoid impairment of the Commission's safety regulatory powers through extension of broad coverage of the Fair Labor Standards Act is evidenced by the failure of Congress to adopt the Section 13(b)(1) amendment prposed by the Administrator in 1945 and by the Congressional extension of safety regulation to motor carrier terminal area pickup and delivery in the 1942 amendment to the Motor Carrier Act, after its exclusion in the 1940 amendment to the Motor Carrier Act. *Levinson v. Spector Motor Service, cited supra, footnotes 27 and 10.*

Congress also had economic factors in mind when it extended the benefit of the Section 13(b)(1) exemption to motor carriers and this Court has so recognized. *Southland Gasoline Co. v. Bayley, et al., cited supra.* See also, the language of this Court's majority in *United States v. American Trucking Associations, Inc., 310 U. S. 534, 541, 542,* and the language adopted by this Court's minority in the latter case, being the language of the lower Court in *31 F. Supp. 35, 38.*

The Congressional purpose is further disclosed in its declaration of the National Transportation Policy, originally enacted as a purpose clause in Section 202(a) of the Motor Carrier Act, and later added as Section 102 of the Interstate Commerce Act, subsequent to enactment of the Fair Labor Standards Act. In its declaration of the National Transportation Policy, Congress speaks of "fair and impartial regulation of all modes of transportation," promoting "economical" service, fostering "sound economic conditions in transportation and among the several carriers," discouraging "unfair or destructive competitive practices," and encouraging "fair wages and equitable working conditions."

It is difficult to see how these purposes can be realized if Petitioner, under the "concurrent jurisdiction" theory, is subjected to overtime compensation payments to certain employees for services performed up to a possible 20 hours in an allowable 60 hour week, while competitive motor carriers are relieved from all liability for overtime compensation to employees performing apparently identical tasks. This would place Petitioner at a competitive disadvantage and would, at the same time, place such competitors' employees at an economic disadvantage in comparison with Petitioner's employees. This would tend to increase, rather than to lessen, the irritation of labor discontent. *Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 576.*

Legislative exemption, of necessity, involves classification, but such classification should be reasonable and consistent with the legislative purpose. Basing exclusion from the overtime benefits of Section 7 of the Fair Labor Standards Act, under Section 13(b)(1), upon the mere frequency with which interstate freight is transported will produce an economic differentiation between Petitioner's employees themselves and between Petitioner's employees, on the one hand, and employees of Petitioner's competitors, on the other, the reasonableness of which is not readily apparent in view of the basic similarity of the services performed.

It is not apparent that Congress intended the availability of the Section 13(b)(1) exemption to be progressively defeated as the volume or percentage of a motor carrier's intrastate freight increased in proportion to the interstate freight transported.

ARGUMENT

I. CERTAIN OF PETITIONER'S EMPLOYEES TRANSPORT INTERSTATE FREIGHT.

The facts of record in this case were presented to the Court in the form of an agreed written stipulation (R. 11-27) and supplement thereto (R. 28-38). Petitioner is engaged in business as a motor common carrier for hire, transporting property by motor vehicle in the Detroit Metropolitan area in a general cartage service and is prepared to render such service to the general shipping public (R. 11, 12). However, the great majority of the traffic handled by Petitioner is transported in intrastate commerce for the principal account of two steel corporations located in Ecorse, Michigan (R. 12).

For purposes of analysis, Petitioner's transportation operations were examined for the calendar year 1941 and it was agreed that these operations fell into five principal categories. Of these principal categories, the third category, designated as "C," indicates that approximately 3% of Petitioner's operation consists of the transportation of freight between the Ecorse Steel Plant and interchange points in the Detroit Metropolitan area such as boat docks, railroad depots, freight terminals and truck terminals. Transportation of the latter category involves the picking up of freight which is moving in interstate commerce in continuous transportation, Petitioner being one of the participating carriers. In some instances Petitioner is paid for his portion of the transportation service by the shipper and in other instances Petitioner's compensation represents a division of the through rate on the transportation movement, paid to him by the collecting interchange carrier (R. 13).

The fifth category of operations, designated as "E," indicates that approximately 1% of Petitioner's operations consists of the transportation of miscellaneous freight in general cartage service for shippers other than the two principal accounts in Ecorse. An unsegregated portion of this latter transportation also involves pickup and delivery of freight moving in interstate commerce, similar to the movement described in category "C" (R. 13).

The foregoing analysis of operations conducted by Petitioner during the year 1941 covered an examination of 19,786 trips of all types. This examination revealed that interstate freight was transported on trips in excess of 3½% of the total trips. The exact percentage appears to be 3.65 but there is room for variation in this percentage figure by virtue of the fact that only trips performed by employees who were employed for a period of eight or more weeks during the year 1941 were analyzed (R. 15).

Exhibit C-1 (R. 24, 25) constitutes an analysis by weeks of the foregoing trips. It discloses that in the average workweek throughout the entire year 1941, nearly one quarter of Petitioner's truck drivers made one or more trips involving the transportation of interstate freight. The percentage of drivers so engaged varied from week to week and in some six workweeks there were more drivers who handled interstate freight than drivers who did not.

Exhibit C-2 (R. 26, 27) constitutes an analysis by employees of the foregoing trips. It discloses that the "average truck driver" handled interstate freight on at least one or more trips in nearly one quarter of the total workweeks during the calendar year 1941. The number of trips performed by each driver in the handling of interstate

freight varied from driver to driver, some two drivers having never handled any interstate freight and some two other drivers having handled interstate freight in a majority of the workweeks.

While all of Petitioner's transportation operations have been physically intrastate, it is generally recognized that a carrier does not have to operate across state lines to be engaged in interstate commerce. Congress clearly recognized this fact in its enactment of the Motor Carrier Act, 1935. Section 206 of the Motor Carrier Act requires all common carriers by motor vehicle to secure certificates of public convenience and necessity from the Interstate Commerce Commission but section 206(a)[1] specifically provides that the securing of such certificate shall not be required of any carrier which is lawfully engaged in the transportation of passengers or property in interstate or foreign commerce between places solely within any state if there be a board in such state having authority to grant or approve such certificate and if such carrier has obtained such certificate from such board. "Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Further recognition of the fact that interstate traffic can be handled in movements physically intrastate can be found by implication in the provisions of Section 202(c)[2] and Section 203(b)(8)[3] of the Motor Carrier Act. Section 202(c) extends safety regulation to motor carrier pickup and delivery service in terminal areas and Section 203 (b)(8) extends safety regulation to the transportation of passengers or property in interstate or foreign commerce

[1] See Appendix, p. 66.

[2] See Appendix, p. 63.

[3] See Appendix, p. 64.

wohlly within a municipality, or between contiguous municipalities, or within a zone adjacent to and commercially a part of any such municipality, except when such transportation is under common control, management or arrangement for continuous carriage or shipment to or from a point without such municipalities or zone. Obviously terminal areas and municipal areas far removed from state boundaries are covered by the provisions of the latter two sections of the Act.

In *Ex Parte No. MC 3, 23 MCC 1,* the Interstate Commerce Commission stated at page 13:

> "It is entirely clear that the physical operation of a truck in the transportation of property from one state to another is not the sole test of whether it is engaged in interstate and foreign commerce. Under the decisions of the Supreme Court of the United States a carrier may operate physically within the limits of a single state and yet be engaged in interstate or foreign commerce."

In Interstate Commerce Commission *Administrative Ruling No. 79, C. C. H. Federal Carrier Service, Par. 6079,* issued May 16, 1939, the following question and answer appeared:

> "Question No. 2: Does a motor vehicle have to cross a state line in order to be engaged in interstate commerce?"
>
> "Answer: No. The interstate character of the shipment may make the trip legally one in interstate commerce, even though the trip is wholly within the boundaries of one state."

Recognition that Petitioner performs some interstate carriage and that some of Petitioner's employees handled interstate freight is also evidenced by the opinion of the Circuit Court of Appeals for the Sixth Circuit in this

case in that the availability of the Section 13(b)(1) exemption was denied, not on the basis that no movements in interstate commerce were shown, but rather on the basis that the frequency with which property was transported in interstate commerce was not of sufficient substantiality to place any of Petitioner's employees within the exemption provision (R. 48-54).

It should also be observed that Petitioner operates as a common carrier for hire, offering a general cartage service to the general shipping public. Petitioner's undertaking as a common carrier imposes upon him the legal compulsion to handle freight as tendered by the shipping public without discrimination. Whether the freight so tendered is to move in intrastate commerce or in interstate commerce and the volume or proportion of freight so moving depends upon the shipping requirements or other exigencies of the shipper rather than upon voluntary selection of traffic by Petitioner. Accordingly, the percentage or volume of interstate freight handled in any given period will vary on the basis of circumstances beyond the control of Petitioner.

For similar reasons, the volume or percentage of interstate freight transported by any particular employee of of Petitioner is likely to be more dependent upon the requirements of the shipper than the voluntary action of Petitioner. This is evidenced by Exhibit C-2 which shows considerable variation in the number of interstate trips performed by the individual employees of Petitioner. The fact that two of Petitioner's truck drivers, as is indicated in Exhibit C-2, perform no interstate trips in the calendar year 1941 is compelling evidence that the handling of freight in interstate commerce is based upon happenstance and that Petitioner did not consciously spread the interstate trips among the various employees in order to invoke the Section 13(b)(1) exemption.

The stipulation also reveals that Petitioner employs some fourteen garage workers, including mechanics (R. 11). The stipulation fails to disclose the percentage of time spent by these mechanics and by the superintendent of maintenance in the repair of the motor vehicles used to transport the interstate freight referred to above. It would appear, however, that if the amount of freight transported in the motor vehicle equipment of Petitioner is considered sufficient to place the truck drivers within the jurisdiction of the Interstate Commerce Commission, the mechanics who repair those trucks may also fall within the jurisdiction of the Interstate Commerce Commission.

II. SUCH INTERSTATE TRANSPORTATION IS SUBJECT TO REGULATION UNDER THE MOTOR CARRIER ACT.

Section 202(a)[1] of the Motor Carrier Act, 1935, states that

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *."

Section 203(b)[2] of the Act provides that no provisions of the Act except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall apply to:

> "(8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except

[1] See Appendix, p. 63.

[2] See Appendix, p. 64.

> when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, * * *"

unless the Commission finds that application of the other provisions of this Act is necessary to carry out the National Transportation Policy. Paragraph 202(c)[3] of the Act states that

> "Notwithstanding any provision of this Section or of Section 203, the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees in safety of operation and equipment, shall not apply—
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental."

Petitioner is engaged solely as a motor common carrier in the transportation of property. He is principally engaged in the transportation of property by motor vehicle in intrastate commerce. However, to the degree indicated in the preceding analysis, Petitioner is engaged in the transportation of property by motor vehicle in interstate

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[3] See Appendix, p. 63.

commerce. If it were not for the provisions of Section 202(c) and Section 203(b)(8), Petitioner would be subject to full regulation by the Interstate Commerce Commission under the provisions of Section 202(a) of the Act. It is apparent, however, that Petitioner's principal business consists of the transportation of property wholly within a single municipality or within a zone adjacent to and commercially a part of such municipality, namely, the Detroit Metropolitan Area. Whether such transportation is conducted under common control, management or arrangement for a continuous carriage to or from a point without such municipality or zone or is not is not readily apparent from the stipulation. However, this does not appear important in view of the fact that both paragraphs 202(c) of the Act and 203(b) of the Act, Petitioner is subjected to safety regulation by the Interstate Commerce Commission.

The intent of Congress to extend safety regulation to all transportation of passengers or property in interstate commerce, irrespective of the volume of interstate traffic carried or the frequency with which it is carried, is evidenced by the provisions of Section 203(b) (9)[1] of the Motor Carrier Act. The latter provisions, similar to the provisions of Section 203(b)(8), provide that none of the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to:

> (9) "The casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * *,"

[1] See Appendix, p. 65.

unless the Commission finds that application of the other provisions of the Act is necessary to carry out the National Transportation Policy.

It has been held that Congress used the words "casual," "occasional," "reciprocal," "regular," "occupation" and "business" in their generally accepted meaning. *Martin v. United States, 100 F. (2d) 490.* If Congress intended, as is evident, to extend the safety jurisdiction of the Interstate Commerce Commission to even the casual, occasional or reciprocal transportation of passengers or property, by motor vehicle, in interstate commerce, for compensation, by persons not even engaged in the business of transportation by motor vehicle, *a fortiori,* Congress certainly intended to subject to regulation even the most casual or occasional interstate transportation of property or passengers by any motor carrier, such as Petitioner, engaged exclusively in the business of transporting passengers or property by motor vehicle.

III. SUCH EMPLOYEES ARE SUBJECT TO THE SAFETY REGULATORY POWER OF THE INTERSTATE COMMERCE COMMISSION.

Section 204(a)[2] of the Motor Carrier Act, 1935, imposes upon the Interstate Commerce Commission a duty to regulate common carriers by motor vehicle and gives the Commission power to establish qualifications and maximum hours of service of employees and safety of operation and equipment. The Commission's safety regulatory powers under Section 204 of the Motor Carrier Act extend only to those motor carrier employees whose duties affect safety of operation. *United States v. American Trucking Associations, Inc., 310 U. S. 534.* Judicial interpretation of the

[2] See Appendix, p. 65.

provisions of Section 204(a) of the Motor Carrier Act is a prerequisite to judicial interpretation of the provisions of Section 13(b)(1) of the Fair Labor Standards Act. "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *United States v. American Trucking Associations, Inc., 310 U. S. 534, 544.* However, the safety reports and regulations of the Interstate Commerce Commission, issued both before and after enactment of the Fair Labor Standards Act, "deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to a specially significant weight in the interpretation of this Act (Motor Carrier Act, 1935) the enforcement of which has been committed by Congress solely to that Commission." *Levinson v. Spector Motor Service, 91 Law Ed, 846, 853.*

The safety reports and regulations of the Interstate Commerce Commission are thoroughly summarized and analyzed in the *Levinson* decision. Many of the observations made by this Court in such process are not material to a decision of the issues in this case because in the *Levinson* case it was necessary to determine whether the Commission's regulatory power over safety was extensive enough to cover partial-duty loaders in advance of the adoption of specific qualifications, standards and maximum hours of service. In the instant case we are concerned principally with full-time drivers, who can be considered partial-duty drivers only in the sense that they are partially engaged in the transportation of intrastate freight and partially engaged in the transportation of interstate freight. Further, the Commission has already established standards of qualification and maximum hours of service for drivers, that being one of the earliest, and principal, items of consideration in the Commission's adoption of its safety program.

In the Commission's earliest reported decision relative to safety regulations for motor carriers, *Ex Parte No. MC 4, 1 MCC 1, 7,* the Commission established its initial rules and regulations governing qualifications of employees and safety of operation of equipment of for-hire motor carriers and stated "We recognize that first and foremost in the problem of motor vehicle safety is the driver, the man at the wheel." In the instant case we are principally concerned with the application of the Section 13 (b) (1) exemption to drivers in view of the fact that approximately two thirds of Petitioner's employees, whose activities are referred to in the stipulation of facts, are drivers and because of the further fact that review by certiorari in this case has been limited to the applicability of the Section 13(b)(1) exemption.

This distinguishing factor, between drivers and loaders, was recognized by this Court in the *Levinson* decision, the Court saying:

> "The principle to be applied is the same in the case of the loader as in that of the driver, although the issue is more obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier. This is because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loaded the freight which the driver is transporting. Furthermore, in the case of the driver, the Commission not only has found that it has the power to establish, but it actually has established, tested and revised, a set of qualifications for his service and a maximum limitation on the aggregate number of hours during which he safely may be permitted to drive during any period of 24 consecutive hours. It also has established a maximum limitation on the number of hours during any 'week' of 168 consecutive

hours during which such a driver safely may be permitted to be 'on duty,' even though many of his activities and much of his time while 'on duty' may not affect safety of operation of the carrier.''

Levinson v. Spector Motor Service, 91 Law Ed. 846, 860, 861.

In *Ex Parte No. MC 2, 3 MCC 665, 671,* the Commission stated that it had established maximum hours of service in order to eliminate unsafe conditions associated with driver fatigue and gave affirmative recognition to the fact that many drivers spend part of their time performing duties other than driving, particularly drivers engaged in picking up and delivering interstate freight in cities and towns. This indicates that the Commission interprets its safety regulatory powers under Section 204(a) of the Motor Carrier Act to include regulations of the maximum hours of drivers engaged in the performance of the type of transportation service in which Petitioner's drivers were engaged, as indicated in the stipulation of facts.

In *Ex Parte No. MC 4, 10 MCC 533, 534,* the Commission made the observation that motor vehicles used in the performance of the type of exempt operations covered by Section 203(b)(8) of the Motor Carrier Act, the type of exempt operation in which Petitioner is principally engaged, are as susceptible to accidents as are motor vehicles operated by non-exempt carriers. After the Commission's hours of service regulations became effective on March 1, 1939, the Commission in *Ex Parte No. MC 4, 14 MCC 669,* extended the maximum hours of service regulations to employees of carriers exempt under the provisions of Section 203(b) of the Motor Carrier Act, but excluded such exempt carriers from its remaining safety regulations. Similarly in *Ex Parte No. MC 3, 26 MCC 205,* the Commission extended its exemption from safety regulation to employees of private

carriers but did not exempt such employees from the maximum hours of service regulations.

In *Ex Parte No. MC 3, 23 MCC 1,* the Commission expressly recognized the possible conflict between its jurisdiction over motor carrier employees, under the provisions of Section 204 of the Motor Carrier Act, and the jurisdiction of the Administrator of the Wage and Hour Division, under the provisions of the Fair Labor Standards Act. At page 11 of that report the Commission directed attention to the fact that the only limitations in the Fair Labor Standards Act upon the hours of drivers is the requirement that overtime compensation be paid if the driver is employed for hours in excess of those prescribed in Section 7. If such overtime compensation is paid, there is no statutory limit on the number of hours a driver may be required to drive. The Commission then stated,

> "Admittedly, the overtime wage penalty should result in a shortening of weekly hours, but the fact remains that, insofar as the statute is concerned, a private carrier of property could require and permit an employee to drive a motor vehicle in interstate or foreign commerce for long and dangerous hours, provided only that additional wages were paid. In our opinion, this would be clearly unsafe."
>
> "Attention is further directed to the fact that the Fair Labor Standards Act would in no way affect the daily hours which a driver might be required to drive or operate a motor vehicle. Even though a driver may have a short week, it nevertheless is highly dangerous that he may be required to drive a motor vehicle on the crowded highways of the country for excessive hours in any one day."

At page 21 of the latter report the Commission stated that no good reason had been suggested, and that it could conceive of no good reason, why the same regulations gov-

erning maximum hours of service of drivers and safety of operation and standards of equipment of motor vehicles should not be made applicable to all types of carriers. It conceded that there should be some modification of its maximum hour regulations in those instances where drivers for private carriers spent more than fifty percent of their time in the performance of activities other than driving. But even here, the Commission reached a determination that such latter drivers should not be exempt from the maximum hours provisions of its safety regulations, but merely that those provisions should be modified. (See page 31 of the report.)

At page 39 of the same report the Commission makes the following statement:

> "We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise, if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week. We express no opinion as to whether or not during that week the driver is subject to the provisions of Section 7 of the Fair Labor Standards Act."

The above quoted interpretative decisions of the Interstate Commerce Commission would indicate that the Commission feels that its safety regulatory powers under Section 204 of the Motor Carrier Act extend even to the most trivial or occasional performance of activities affecting safety of operation by employees who may spend a majority of their time in the performance of duties which do not affect safety of operation. However, a number of Courts, including the Sixth Circuit Court of Appeals in the instant case, *155 Fed. (2nd) 832,* have reached a determination that the Section 13(b)(1) exemption is not applicable to motor carrier employees unless they devote a substantial part of their time to the performance of duties affecting safety of operation. Many of these courts have based their determination upon an alleged finding by the Interstate Commerce Commission in *Ex Parte No. MC 2, 28 MCC 125,* that the Commission's power under Section 204(a) of the Motor Carrier Act extends only to employees "who devote a substantial part of their time to activities which directly affect the safety of operation."

It is respectfully submitted by Petitioner that the Commission's decision in *Ex Parte No. MC 2, 28 MCC 125,* when read in its entirety, is not subject to the construction which has been placed upon it by such Courts. In the latter decision the Commission was seeking to determine what motor carrier employees, other than drivers, performed such duties affecting safety of operation as to place them within the jurisdiction of the Commission. The Commission made certain findings and drew certain conclusions from those findings. The net result was that the Commission reached a determination that mechanics, loaders, and helpers, as a class, perform duties affecting safety of operation and are therefore within the jurisdiction of the Commission. On the contrary, the Commission reached a determination that certain other classes of employees, such as

dispatchers, did not perform duties affecting safety of operation and were not subject to the Commission's safety regulatory powers. In speaking of "substantial time," it is believed to be apparent from the Commission's entire decision that it was speaking of employees by classes and was not referring to a specific analysis of the amount of time spent by individual employees in the performance of duties affecting safety of operation.

This distinction appears to be fully recognized by this Court's majority in the *Levinson* decision. At page 856 of the official Law Edition report this Court's majority observes that in the absence of any discussion or classification, on a time basis, of the several activities of loaders, the finding with respect to them amounted to another way of saying that a large part of a loaders' activities affect safety of operation. This Court observes that there is nothing to indicate that the Commission uses the element of time other than as representative of the continuing work period, during all of which the loader is devoting himself to the activities of his job as a loader. At page 857 this Court observes that the decision of the Commission tacitly recognizes that even a full-duty loader may engage in some activities which do not affect safety of operation and that such non-safety activities may make up a large part of the loader's total activities and may even constitute a larger part of his activities than his safety affecting activities. This Court's majority then summarizes its observations with the statement that the fundamental test is simply that the employees' activities affect safety of operation, and refers to this test as the one prescribed by this Court in *United States v. American Trucking Associations, cited supra.*

This Court's minority in the *Levinson* case appears to be in agreement with those lower courts who interpret the

Commission's decision in *28 MCC 125* as a voluntary restriction upon its safety regulatory powers. However, this Court's minority rejects such conclusion by the Commission, stating at page 868 of the official Law Edition report "In adopting 'substantial time' rather than 'substantial effect,' I agree that the Commission has ruled too narrowly" and adds "Accordingly, I conclude, independently of its formal determination, that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation."

Thus it appears questionable whether the Commission intended to restrict its safety regulatory powers to motor carrier employees who spend "substantial time" in the performance of duties affecting safety of operation. However, if the Commission's decision is capable of such construction, it obviously is in conflict with the Commission's determination in *23 MCC 1, 39, cited supra,* and the restrictive determination is rejected by both the majority and the minority of this Court. In any event, such restrictive determination is inapplicable to the instant case because the determination did not relate to the activities of truck drivers, the Commission having already concluded that its safety regulatory powers extended to drivers of motor vehicle equipment, both full-duty and partial-duty drivers.

Referring once again to the Commission's decision in *Ex Parte No. MC 3, 23 MCC 1,* it is apparent that the Commission does not believe that it can maintain an adequate safety program unless it extends its safety regulations to drivers who handle interstate freight, irrespective of the volume of interstate freight handled or the frequency with which it is handled. In this connection it is important to observe that when the Commission speaks of its safety

regulatory powers extending to a motor carrier employee who performs duties affecting safety of operation once during a given week, it is not speaking of the "workweek" adopted by the Administrator of the Wage and Hour Division, United States Department of Labor.

The regulations of the Administrator of the Wage and Hour Division are all predicated upon the so-called "workweek."[1] The Interstate Commerce Commission in its safety regulations defines a "week" as any period of 168 consecutive hours.[2] The Commission explains what it means by a consecutive 168 hour period week in its Administrative Ruling No. 79, issued May 16, 1939.[3] In the form of a number of questions and answers the Commission states that a driver is limited by the regulations for 60 hours "on duty" in any period of 168 consecutive hours (7 days) beginning at the time the driver reports for duty. If a driver is on duty in interstate commerce for the permissible 60 hours in the first five days of a calendar week, he can then work additional hours in intrastate commerce during the remaining two days but this additional time must be taken into consideration if and when he returns to driving or other work in interstate commerce. In other words, work performed during the preceding seven days must be reviewed in order to determine whether the driver may legally operate in interstate commerce on the eighth day. The Commission, in its Administrative Ruling, states that this is an example of the Commission's "sliding week,"

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[1] Interpretative Bulletin No. 9, October 1, 1943, Wage and Hour Manual (1944-1945 ed.) 520, 523.

[2] Safety Regulations for carriers by motor vehicle, 47 C. F. R. Cum. Supp., Part 190—General definitions; Part 191—Hours of Service.

[3] Hours of Service Regulations—Application and Interpretation; Administrative Ruling No. 79; reported in C. C. H. Federal Carriers Service, paragraph 6079.

made necessary by its safety regulations, which insures that a driver in interstate commerce will have adequate periods off duty if he is to continue to work in interstate commerce.

Thus, in order to determine whether a driver has performed duties affecting safety of operation in interstate commerce during the Commission's "week," it is necessary to give consideration to the duties performed during the preceding 168 hours and also during the ensuing 168 hours; whereas under the Administrator's "workweek," it is only necessary to examine the pay period. Thus, let us assume that a driver is employed on a "workweek" basis, his compensation being payable on a calendar week basis for services performed from Monday morning to Saturday night, and he handles interstate freight on a single day, namely Wednesday, in the calendar week. In such event, the driver has performed services affecting safety of operation once during the Administrator's "workweek," commencing Monday morning and terminating Saturday night, but he has also performed services affecting safety of operation in the Commission's "week" commencing 168 hours prior to Wednesday and terminating 168 hours after Wednesday. Thus he performed interstate transportation services in the Commission "week" commencing on Thursday of the calendar week before the services were performed and also in the Commission "week" terminating Tuesday night in the calendar week after the services were performed.

IV. THE SAFETY REGULATORY POWER OF THE COMMISSION IS NOT AFFECTED BY THE VOLUME, DEGREE, OR FREQUENCY OF SUCH INTERSTATE TRANSPORTATION.

In *Levinson v. Spector Motor Service*, cited *supra*, this Court found the Section 13(b)(1) exemption applicable to a "checker" or "terminal foreman," a substantial part of whose activities in that capacity consisted of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier, as such class of work is defined by the Commission. In that case this Court determined that the Section 13(b)(1) exemption was applicable to partial-duty loaders as well as full-duty loaders, as is evidenced by the fact that the affected employee, Levinson, as a checker or terminal foreman, spent only a portion of his time in the performance of loading activities. This determination was reached even though the Interstate Commerce Commission had not as yet established qualifications or maximum hours of service for loaders.

Had Levinson been a driver rather than a loader, the safety jurisdiction of the Interstate Commerce Commission and the applicability of the Section 13(b)(1) exemption would have been even more obvious, "because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loads the freight which the driver is transporting."

In the instant case we are principally concerned with the applicability of the Section 13(b)(1) exemption to full time drivers. The facts of record do not reveal that the Petitioner's drivers perform any duties other than driving. In this sense they are full time drivers. They are only partial-duty drivers in the sense that they drive a minority of their time transporting interstate freight and drive a majority

of their time in transporting intrastate freight. Their total performance of duties during on duty hours involves safety of operation, whether interstate or intrastate.

The principal basis for the *Levinson* decision appears to lie in this Court's determination that the safety program entrusted to the Interstate Commerce Commission by Congress and gradually developed by the Commission through the years should be preserved intact. This observation finds support in the following statements in the majority opinion: That Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936 (852); that it is essential to the Commission's safety program, whenever and wherever hazardous activities are engaged in that affect safety of operation of an interstate motor carrier, that those who engage in them shall be qualified to do so and that maximum hours of service affecting such safety of operation shall be established and enforced (856); that this requires the retaining, rather than the relinquishing, of the Commission's jurisdiction over even partial-duty drivers and partial-duty loaders (856); that the fundamental test is simply that the employees' activities affect safety of operation, that being the test prescribed by this Court in *United States v. American Trucking Associations, 310 U. S. 534,* here affirmed; that it is not a question of fundamental concern whether or not it is the larger or the smaller fraction of the employee's time or activities that is devoted to safety work, because it is character of the activities, rather than the proportion of either the employee's time or of his activities, that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment (859); that while the work of a full-duty driver may affect safety of operation during only that part of the time

while he is driving, yet, as a practical matter, it is essential to establish reasonable requirements with respect to his qualifications and activities at all times in order that the safety of operation of his truck may be protected during those particular hours or days when, in the course of his duties as a driver, he does the particular acts that directly affect the safety of its operation (859); and that from a safety standpoint, a partial-duty driver who drives 30 hours continuously and then drives no more during that week creates a greater hazard than the man who drives ten hours daily for six days a week (862).

Even the minority opinion in the *Levinson* case reveals a unanimity of opinion as to the paramount importance of preserving the safety jurisdiction of the Interstate Commerce Commission, as is evidenced by the following statements from the minority opinion: That, factually speaking, not the amount of time an employee spends at work affecting safety, but what he may do in the time thus spent, whether it be large or small, determines the effect on safety (865); that ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one (865); that it would seem essential to effective safety control by the Commission that it should have power to determine the qualifications and maximum hours of service of all employees whose work substantially affects safety, whether or not they spend what may be found to be less than a "substantial" amount of time in that sort of work (865); that anything less than this would open the door to the greatest danger to motor traffic from casual, unqualified drivers or other employees whose work affects safety (865); that the "safety first" view of the Commission's power should be accepted and that this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it

to any extent, though the time thus spent is not five minutes daily or weekly (865); that all employees who do any part of certain kinds of work, for however short a time, regularly or casually, fall within the Commission's powers (865); that a person who spends ten minutes a day or an hour a week in driving or in mechanically repairing trucks, and the remaining thirty-nine hours of a forty hour week in work having no effect upon safety, falls within the Commission's authority (866); that it cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effect upon safety (866); and that "substantial effect" upon safety, rather than "substantial time" spent in doing work affecting it, determines the scope of the Interstate Commerce Commission's safety powers (868).

In an earlier and materially significant minority opinion of this Court the theory was advanced that possibly mechanics, employed not directly by a motor carrier but rather by a separate service establishment under common ownership, should be declared subject to the Commission's safety regulatory powers in order to prevent partial nullification of the power of the Interstate Commerce Commission to deal with the problem of safety. Said the author of the latter minority opinion, "We should refuse to whittle down that jurisdiction, even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act." *Boutell, et al. v. Walling, 66 S. Ct. 631, 637.*

At the time of this Court's decision in the *Levinson* case, the Administrator of the Wage and Hour Division had taken and was taking the position that a motor carrier

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[20] Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, par. 4b, November, 1943, 1944-1945. W. H. Man. 520, 523.

employee fell outside the scope of the Section 13(b)(1) exemption if he spent the greater part, or more than 50%, of his working time in the performance of activities not affecting safety of operation.

Prior to the *Levinson* decision, this position of the Administrator had been at least questioned and in some instances rejected even in cases where a determination was made that the motor carrier employee did not fall within the scope of the Section 13(b)(1) exemption because he had not devoted substantial time to the performance of duties affecting safety of operation. (See *Walling v. Comet Carriers, 151 F. (2nd) 107;* Certiorari granted, *326 U. S. 716;* Writ of Certiorari dismissed on motion of counsel for Petitioner, *328 U. S. 819*). In the *Comet* case the Second Circuit Court of Appeals states that the Administrator's interpretation, as reflected in Interpretive Bulletin No. 9 should be rejected; that the Section 13(b)(1) exemption cannot be construed so loosely; and that the exemption section contains no language limiting the power of the Commission to employees who are engaged in interstate commerce for the greater part of the working time in any one workweek.

In this connection note the decision in *Richardson v. James Gibbons Co., 132 Fed. (2nd) 627;* affirmed by the Supreme Court in *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44.* In the *Richardson* case there was a conflict in testimony as to whether Richardson spent more or less than 50% of his time in the performance of activities affecting safety of operation. However, both the Fourth Circuit Court of Appeals and this Court determined that the Section 13(b)(1) exemption was applicable to Richardson without comment on the amount of time devoted by Richardson to the performance of duties affecting safety of operation.

In the *Levinson* decision the Administrator's interpretation of Section 13(b)(1) is expressly rejected, largely on the ground that Section 13(b)(1) involves an exception which is not to be measured by regulations of the Administrator, but which is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to the provisions of the Motor Carrier Act (860). In *Ex Parte No. MC 3, 28 MCC 1*, the Interstate Commerce Commission had already given consideration to the fact that some drivers spend more than fifty percent of their time performing activities other than driving but still extend maximum hour regulation to such latter partial-duty drivers. In accepting the Commission's interpretation of its power and rejecting the Administrator's interpretation of Section 13(b)(1), this Court points out in the Levinson decision that

> "The fundamental and ever recurring difficulty with the Administrator's interpretation of the scope of Section 7 of the Fair Labor Standards Act is that to the extent that he expands the jurisdiction of the Fair Labor Standards Act he must reduce the jurisdiction of the Commission under the Motor Carrier Act, whereas he has no authority to do so (863)."

In further support of its determination that the Administrator's interpretation of Section 13(b)(1) was not in conformity with the congressional intent, this Court in the *Levinson* decision points out in Footnote 27 (P. 864) that in 1945 the Administrator recommended certain amendments to the Fair Labor Standards Act, one of which would have resulted in an amendment to Section 13(b)(1) so as to provide that the provisions of Section 7 should not apply with respect to any employees "who during the greater part of any workweek" are engaged in work with respect to which the Interstate Commerce Commission "has established qualifications and maximum hours

of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935." The proposed amendment was eliminated from the Senate Bill and was never included in the House Bill and neither the Senate nor the House Bill contained the proposal when Congress adjourned.

The safety principles enunciated by this Court in the *Levinson* decision, in determining the applicability of the Section 13(b)(1) exemption to a motor carrier employee on the basis of his being a partial-duty loader, should apply with even greater strength to those employees of Petitioner here under consideration. Petitioner's truck driver employees are full-time drivers and the stipulation is silent as to their performing any duties other than duties affecting safety of operation. True, the safety of operation so affected principally concerns the movement of intrastate freight and to a lesser extent concerns the movement of interstate freight. However, it should be fairly obvious that a motor carrier employee who spends his entire time driving a motor vehicle, particularly in an area involving such population density and traffic concentration as the Detroit Metropolitan area, is the type of employee whose non-qualification or non-observance of the Commission's maximum hours of service regulation is most likely to have an adverse effect upon safety of operation of motor vehicle equipment. Such an employee, in the normal course of conduct of a transportation enterprise, is the one most likely to find himself performing duties subject to Interstate Commerce Commission regulation. This is strongly evidenced by Exhibits C-1 and C-2 (R. 24, 25, 26, 27) which disclose a total lack of uniformity in the allocation of trips involving the transportation of interstate freight among the various employees of Petitioner. This demonstrates that not one, or any certain few, of Petitioner's truck drivers should

be required to meet the Commission's qualifications and maximum hours of service regulations, but that all of them should meet such qualifications and should conform to such regulations because of the continuing possibility that they will be called upon to transport interstate freight at any given moment in the usual and normal performance of their truck driving duties for a carrier who holds himself out as a common carrier to the general shipping public.

V. SUCH EMPLOYEES ARE EXEMPT FROM THE OVERTIME COMPENSATION PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

In the light of the *Levinson* decision, it appears probable that the entire membership of this Court consistently could reach a determination that at least certain of Petitioner's employees are subject to the safety regulatory powers of the Interstate Commerce Commission during at least certain periods of their employment. The Interstate Commerce Commission, in its decision in *Ex Parte No. MC 3, 23 MCC 1, 39,* has expressed the opinion that if a driver operates a motor vehicle in the transportation of interstate freight on any day of a given week, such driver is subject to the weekly maximum prescribed in the Commission's regulations and if a driver is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum prescribed in the Commission's safety regulations.

This Court's majority in the *Levinson* decision commented at page 853 on the fact that the safety reports and regulations of the Commission, issued both before and after the enactment of the Fair Labor Standards Act, deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle the

Commission's findings to significant weight in the interpretation of the exemption. At page 858, this Court's majority said that it saw no reason to question the Commission's conclusion that the activities of full-duty drivers affect safety of operation. At page 859, this Court's majority expressed the opinion that motor carrier employees should be kept within the jurisdiction of the Commission's safety program even where their safety duties were only partial-duties. This Court's minority in the *Levinson* decision agreed with the Court's majority as to the "safety first" view of the Commission's power, stating at page 865 that this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, even though the time thus spent was not five minutes daily or weekly. Driving and the work of mechanical repair of trucks were cited as obvious examples.

Assuming that this Court will reach such consistent determination that certain of Petitioner's employees are subject to the safety regulatory powers of the Commission at least during certain periods of their employment, it would seem to follow necessarily that such employees during such periods are expressly and explicitly exempt from the overtime compensation provisions of Section 7 of the Fair Labor Standards Act. Section 13(b)(1) of the Fair Labor Standards Act so states literally.

In the second paragraph of the *Levinson* decision this Court stated, "We hold that the Commission has that power (to establish qualifications and maximum hours of service for a partial-duty loader) and that Sec. 13(b)(1) of the Fair Labor Standards Act therefore expressly excludes any such employee from a right to the increased pay for overtime service prescribed by Section 7 of that Act."

On page 862 of the official Law Edition report, this Court's majority stated that Levinson's activities affected safety of operation and that as a consequence, "he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of Section 13(b)(1) of the Fair Labor Standards Act, that he is excluded, automatically, from the benefits of Section 7 of that Act."

This Court's minority in the *Levinson* decision admits (page 865) that "Read literally, in the light of the *Southland* decision, the section would exempt all employees who do any work affecting safety operations * * *." Again on page 866 this Court's minority admitted that an exact literal application of Section 13(b)(1) of the Fair Labor Standards Act would result in the exemption or exclusion from the provisions of Section 7 every employee who might spend ten minutes a day in work substantially affecting safety and seven hours and fifty minutes in work having no effect whatever upon it.

The basis for the dissenting opinion in the *Levinson* case appears to be solely the contention that Congress could not have intended Section 13(b)(1) of the Fair Labor Standards Act to exclude from the benefits of overtime compensation all employees of motor carriers over whom the Interstate Commerce Commission had safety regulatory powers, despite the literal language of Section 13(b)(1). The minority in no way disagrees with the majority concerning the proposition that the Commission's safety jurisdiction should not be impaired in an attempt to extend broad coverage of the Fair Labor Standards Act. Apparently the only way perceived by the minority to preserve the Commission's safety jurisdiction and at the same time extend broad coverage of the Fair Labor Standards Act was to find the possible existence of con-

current jurisdiction of the Commission and the Administrator over certain *motor carrier employees*. The difficulty with the concurrent jurisdiction theory is its adoption would require not only a reversal of this Court's position in past decisions, but also would require complete disregard of the Congressional purpose as elsewhere expressed.

Acceptance of the concurrent jurisdiction theory would of necessity result in a reversal of this Court's position in the *Levinson* case. It would also require a reversal of this Court's position in *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44, 48, 49*, where this Court said:

> "By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime."
>
> "Not only does the language of Section 13(b)(1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

In support of the latter observation this Court refers to statements made on the Senate floor to the effect that the amendment as to motor vehicle operators was intended to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service Acts. (81 Cong. Rec. 7875; 34 Stat. 1415, 39 Stat. 721.)

There is nothing in the record in this case which would indicate, and we can perceive no basis for any argument, that a motor carrier engaged in the transportation of property, a majority of whose freight moves in intrastate commerce, is any less engaged in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime, than a motor carrier of property transporting a majority of its freight in interstate commerce. It is also difficult to see upon what basis it could be contended that a carrier engaged principally in the transportation of property in interstate commerce should be subjected to regulation by a single federal agency and freed from regulation by two federal agencies, but that a carrier principally engaged in the transportation of property in intrastate commerce should, by virtue of that fact, be subjected to regulation by two federal agencies instead of one.

This Court's opinion in the *Southland Gasoline Company* case was expressly affirmed (page 858) in the *Levinson* opinion. In the *Levinson* decision, (page 852) this Court again concluded that:

> "Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in Section 7 of the Fair Labor Standards Act. Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to

the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act."

In support of the last cited statement, the Court makes reference to the failure of both Houses of Congress to adopt the amendment proposed by the Administrator in 1945 which would have amended Section 13(b)(1) to provide that exclusion from the provisions of Section 7 would apply only to an employee who during the greater part of any workweek was engaged in work with respect to which the Interstate Commerce Commission had established qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act. The Court also points to congressional amendments to the Motor Carrier Act in 1940 and in 1942, subsequent to the effective date of the Fair Labor Standards Act, as evidence of the congressional intent to prevent overlapping jurisdiction. (See footnote ten on page 851.) The 1940 amendment to the Motor Carrier Act excluded certain motor vehicle pickup and delivery service within terminal areas. The Administrator immediately asserted his jurisdiction over motor carrier employees so affected, but in the 1942 amendment Congress extended the exclusion of motor vehicle pickup and delivery service within terminal areas, but did subject such operations to the provisions of Section 204 relative to qualifications and maximum hours of service.

Apart from purely safety considerations, there is some strong evidence that Congress had economic factors in mind in extending regulation to motor carriers of property and those economic considerations have been recognized by this Court in the *Southland Gasoline Company* decision, in that portion cited above. There have been other decisions of this Court to similar effect.

In *United States v. American Trucking Associations, Inc., 310 U. S. 534, 541, 542,* a majority of this Court stated,

> "In the broad domain of social legislation few problems are enmeshed with the difficulties that surround a determination of what qualifications an employee should have and how long his hours of work may be. Upon the proper adjustment of these factors within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected as well as the employment and efficiency of the workers."

This Court's minority in the *American Trucking Association* case rested its dissent, without further comment, upon the opinion of the District Court of the United States for the District of Columbia which had been reversed by the majority decision. In the lower court decision, *31 F. Supp. 35, 38,* the District Court said:

> "The hearings before the Committee of Congress developed that the percentage cost of labor was equal to nearly half the total gross revenue of motor carriers, and the special attention of Congress was directed by representatives of the unions to the labor aspect as applied to the problems of uniformity and stabilization, because of widely diversified business organization, absence of labor organization in some regions, and the claimed unreasonable practices of many operators.
>
> And it is easy to see that stabilization of labor conditions as applied to this industry is an important, and indeed a necessary, part of the establishment of rates and general business regulation, matters as to which the Commission admittedly is expert, and these objectives appear as part and parcel of the purposes of the legislation. In this aspect, it is reasonable to conclude that Congress had them in mind when later, upon passage of the Fair Labor

> Standards Act, it provided specifically that Section 7 thereof—which establishes maximum hours of service—should not apply 'with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carrier Act, 1935, or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.'"

Justification for these expressions of judicial opinion that Congress also had economic factors in mind in its enactment of legislation extending the Commission's regulatory powers to motor carriers may be found in the purpose clause, originally found in Section 202(a) of the Motor Carrier Act and placed before Part I of the Interstate Commerce Act by the Transportation Act of 1940, subsequent to the enactment of the Fair Labor Standards Act of 1938. This clause now appears as Section 102 of the *Interstate Commerce Act, U. S. Code, Title 49, Chapter 1,* and purports to be a declaration of the National Transportation Policy of Congress.

Section 102 of the Interstate Commerce Act reads as follows:

> "It is hereby declared to be the national transportation policy of the congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive

competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Petitioner respectfully submits that extension of concurrent jurisdiction of the Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor, to the employees of Petitioner, and the exclusion of employees of competitive motor carriers from the jurisdiction of the Administrator, defeats the Congressional purpose as outlined in the National Transportation Policy and as interpreted by the decisions of this Court.

Under the Interstate Commerce Commission's safety regulations the average truck driver is permitted to work sixty hours in any consecutive period of one hundred sixty-eight hours. Under the provisions of Section 7 of the Fair Labor Standards Act any motor carrier driver deemed to be covered by the provisions of that Section is entitled to receive overtime compensation at time and one-half his regular rate of pay for all hours worked in excess of forty. Assuming concurrent jurisdiction of the Interstate Commerce Commission and the Administrator, this means that in any allowable period of sixty hours in a seven day workweek period a truck driver employee may be entitled to receive overtime compensation up to 20 hours, or one third of his total allowable hours.

The record in this case (R. 19, 28, 29) discloses that Petitioner's truck driver employees are compensated for their services pursuant to the terms of a union contract covering all union drivers engaged in general cartage operations within the Detroit Metropolitan Area, whether employed by companies engaged exclusively in a general cartage business in competition with a defendant, or employed to perform cartage operations in competition with Petitioner's operations by motor carriers engaged in line haul freight transportation in interstate commerce. Clearly the truck drivers of the line haul carriers are subject to the exclusive jurisdiction of the Commission and are excluded from the jurisdiction of the Administrator under the provisions of Section 13(b)(1) of the Fair Labor Standards Act. If the concurrent jurisdiction theory is adopted by this Court, both the truck driver employees of Petitioner and the truck driver employees of the line haul carriers may legally perform services up to sixty hours under Interstate Commerce Commission regulation. However, the Petitioner would then be exposed to liability for overtime compensation for all services performed by all truck drivers beyond forty hours and up to sixty hours in a given seven day period while the line haul carrier employers operating in competition with Petitioner would be exposed to no overtime compensation. Thus Petitioner is placed at a competitive disadvantage with such competitors and such competitor's employees are placed at an economic disadvantage in comparison with Petitioner's employees. This will tend to create the very basis for labor discontent and unfair competition which Congress allegedly sought to alleviate or to eliminate in its enactment of the Fair Labor Standards Act.

This court said in *Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 576.*

> "Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition, through undue extension of hours, by introducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime hours, but Congress may properly use it to lessen the irritation."

If Congress made provision for the payment of overtime compensation in the Fair Labor Standards Act as a means of lessening the irritation arising from labor discontent and unfair competition, it is difficult to see how this purpose can be accomplished if payment of overtime compensation is to be conditioned upon the volume, percentage or degree of interstate freight handled or interstate services performed as between truck driver employees physically engaged in what would appear to be identical transportation operations.

While legislative exemption and exclusion must, of necessity, involve classification, such classification should meet the tests of reasonableness and consistency with the legislative purpose. Application of the concurrent jurisdiction theory to any of Petitioner's employees on the mere basis of volume of interstate freight handled or frequency of interstate services performed, will produce an economic differentiation between employees of a single employer, the reasonableness of which will not be readily apparent to the affected employees or to their employer in view of the basic similarity of the services performed by such employees. The same reasoning is applicable to the extension of a similar differentiation between the employees of two or more carriers engaged in the performance of purely competitive services. Nor is it apparent

that Congress intended the exemption to afford relief to motor carriers on a differential basis, decreasing in effectiveness as the volume or percentage of purely intrastate activity increases.

Referring once again to the National Transportation Policy enunciated by Congress in Section 102 of the Interstate Commerce Act, it is difficult to observe how the application of the Section 13(b)(1) exemption on the basis of volume, percentage or frequency of interstate property transportation will result in "fair and impartial regulation of all modes of transportation"; will promote "economical and efficient service"; will "foster sound economic conditions in transportation and among the several carriers"; will "encourage the establishment and maintenance of reasonable charges for transportation"; will remove "unfair or destructive competitive practices"; or will "encourage fair wages and equitable working conditions."

Respectfully submitted,

GEORGE S. DIXON,
MATHESON, DIXON & BRADY,
Attorneys for Petitioner,
2280 Penobscot Building,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
September 10, 1947.

APPENDIX

Fair Labor Standards Act, Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C.

"207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"213. Exemptions

(b) The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of sections 1-27 of Title 49."

"215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;"

"302. Application of provisions

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefore, is hereby vested in the Interstate Commerce Commission.

(c) Notwithstanding any provision of this section or of section 303, the provisions of this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) To transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrange-

ment) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. Feb. 4, 1887, c. 104, Part II, Sec. 202, as added Aug. 9, 1935, c. 498, 49 Stat. 543 and amended Sept. 18, 1940, c. 722, Title I, Sec. 17, 54 Stat. 920; May 16, 1942, c. 318, Sec. 2, 56 Stat. 300."

"303. Definitions and exceptions.

(b) Vehicles excepted from operation of law. Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone

adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit. Feb. 4, 1887, c. 104, Part II, Sec. 203, as added Aug. 9, 1935, c. 498, 49 Stat. 544 and amended June 23, 1938, c. 601, Sec. 1107 (j), 52 Stat. 1029; June 29, 1938, c. 811, Secs. 2, 3, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, Secs. 16, 18, 54 Stat. 919, 920."

"304. Powers and duties of commission

(a) Powers and duties generally. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Com-

mission may establish reasonable requirements, with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

"306. Certificate of convenience and necessity

(a) Necessity for; motor carriers in *bona fide* operation on June 1, 1935. Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; * * * And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."